UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT, LLC,

Respondent,

and

Communications Workers of America, AFL-CIO,

Charging Party.

Cases: 16-CA-168863
16-CA-172713
16-CA-179506
16-CA-180805
16-CA-181189
16-CA-187487
16-CA-191963
16-CA-199947
16-CA-200961
16-CA-209070
16-CA-209995

RESPONDENT ADT'S REPLY BRIEF

Respondent ADT LLC d/b/a ADT Security Services ("Respondent" or "ADT", by and through its attorneys and pursuant to Section 102.42 of the National Labor Relations Board's ("the Board's") Rules and Regulations, submits this Reply Brief in response to the Answering Briefs filed by the General Counsel and Charging Party Communications Workers of America, AFL-CIO ("the Union").

On November 16, 2018, Administrative Law Judge Robert A. Ringler issued his Decision ("ALJD") in the above-captioned matter. The primary matter at issue in this case is the impact of Respondent's acquisition of a non-union operation known as "Brinks" or "Broadview." The Broadview operation ultimately was combined with an existing Union-represented, legacy workforce. There can be little question whatsoever that the combined unit constituted the only viable "bargaining unit" given the overwhelming community of interest shared amongst the legacy Union workforce and the Broadview employees.

As noted in Respondent's Brief, it is undisputed that the Broadview workers constituted a substantial majority within the only bargaining unit available as of the acquisition. According to the Regional Director in the underlying RM petition, Broadview employees outnumbered the legacy Union employees by a count of 92 to 60 (DDE, p. 6). The Board majority and minority opinions in the RM case pegged the majority at 70 to 58 and 89 to 51, respectively. *Id*. at 7. A prolonged period of litigation and Board inaction followed.

After nearly a five (5) year period of Union obstruction and Board delay, the Administrative Law Judge's Decision ("ALJD") determined that the Union has magically become a majority union. The Decision reaches this result by advancing three (3) unsustainable propositions: (1) the Company was required to add all new hires to the minority legacy Union group, even though such action clearly would mean adding employees to a minority union pending resolution of the RM petition; (2) every new hire must be added to the Union's "column" and, once added, may never be removed even as attrition takes place; and (3) this unique arithmetic provides the ALJD with a basis to claim the Company engaged in excess hiring simply to undermine the legacy Union group and unrelated to business needs, resulting in an incredible and unabated headcount increase of 60% over a three (3) year period. (ALJD 16:16). As detailed in Respondent's Brief, the ALJD bears no relationship whatsoever to the actual facts and evidence in this matter.

I. Neither the General Counsel nor the Union Advances Any Meaningful Defense of the ALJD's Outlandish Conclusions Regarding the Actual Composition of Respondent's Workforce.

The ALJD's numbers are simply untethered to any reality. The reasons for this conclusion are fully laid out in Respondent's Brief. For purposes of this submission, it is noteworthy that the General Counsel and the Union essentially concede this point.

For its part, the General Counsel falsely claims that the record does not contain evidence of "attrition," only "hiring." (GC Brf. at 10). As an evidentiary matter, this claim fails because the record does, in fact, contain substantial information demonstrating attrition from the workforce over a prolonged period. (R. Ex. 8-10). The ALJD chose to ignore this evidence to advance its preferred narrative. In addition, the ALJD also apparently relies, at least in part, on simply "granting" the Union approximately forty (40) employees related to Respondent's acquisition of Protection One ("P1"). This acquisition occurred during the prolonged delays associated with this proceeding. No evidence or basis exists for the ALJD ascribing these employees to the Union. Like the ALJD, the General Counsel attempts to gloss over a readily apparent reality. Specifically, ***at no point in time can the legacy Union complement constitute a majority, even with the benefit of "new hires."*** Instead, the "majority" analysis succeeds only if one completely ignores attrition, sprinkles in a substantial number of P1 employees not involved in this proceeding, and presumes, without any evidentiary basis, a massive increase in the overall workforce.

The Union likewise appears to recognize the realities surrounding its minority status and the undeniable fact that any inclusion of Broadview employees in an analysis (or, worse yet, a representation election) would expose the charade of any claim to majority support. Tellingly, the Union continues to advance an "alternate theory" that a unit of only legacy employees (currently totaling less than 20) and new hires can stand apart from the Broadview group. (U. Brf. 11-14). This alternate theory fails due to the overwhelming community of interest shared by all three (3) employee groups (legacy, Broadview and new hires).

Significantly, however, this contention also reveals the Union's full awareness of the absurd contentions contained in the ALJD (for example, that the DFW workforce at some point

totaled over 200 employees (ALJD, p. 16:16); an unabated employee increase of sixty percent (60%) occurred in a mere three (3) years (*Id.*); and newly-acquired P1 workers should be included in the Union's total). The Union's reliance upon an alternative theory that ignores the Broadview group is significant as a tacit admission that the ALJD's claims of majority status are a mirage.

II. The Company Cannot Safely Add "New Hires" to a Minority Union.

The ALJD's new hire analysis also simply ignores the procedural and litigation realities surrounding this matter. An employer violates the Act where it recognizes and bargains with a minority-supported union under Section 8(a)(2). *See International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731 (1961). It is undisputed that the Union was, and likely remained, a minority-union during the vast majority (if not all) points in time between the filing of the RM petition and the Company's withdrawal of recognition.

Setting aside the ALJD's numerical shortcomings, its practical impact is unfathomable. At base, the ALJD stands for the proposition that an employer ***not only*** may be charged with continued recognition of a minority union for some period of litigation, ***but also*** should place all newly-hired employees into the otherwise unrecognizable union for a prolonged period until matters are resolved. Nothing in Board law, and no contractual recognition clause analysis, permits or should permit an employer outside the construction industry to "force" additional employees (who never had an opportunity to vote or decide for themselves) into a union that is no longer viable as a Section 9 bargaining representative.

Notably, Region 16 and the Board itself recognized as early as 2014 that new hires were not being placed in the apparently defunct legacy unit pending the results of the RM election. The dissenting RM opinion, in fact, expressly warns of the potential Section 8(a)(2) violations

surrounding the Company's continuing recognition of the Union. Slip. op. at 8. Nonetheless, the ALJD inaccurately, and with absolutely no reckoning of this matter's litigation history, simply adds large numbers of "new hires" to a minority union's "column" over a prolonged period.

This result simply cannot be reconciled with any desire to advance or protect employee free choice. The ALJD, the Union and the General Counsel provide absolutely no rational basis for the proposition that the reality of the Union's minority status should be ignored for a prolonged period.

III. No Rational Employer Should Ever Again Embrace the Principles of *Levitz Furniture* if the Board Blesses the ALJD's Approach Here.

The ALJD's factual and analytical shortcomings are self-evident. Importantly, however, the Board in this matter must reconcile whether its pronounced preference for Board-conducted elections should be taken seriously.

The Board supposedly will process an RM petition wherever an employer demonstrates a "reasonable good faith uncertainty" as to a union's continued majority status. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001). Levitz claims that, "Board conducted elections are the preferred way to resolve questions regarding employees' support for unions." *Levitz*, at 723. In this matter, a question regarding employee support for the Union has existed at all times following the Broadview acquisition and merger. The question has not been "resolved" simply through an ALJD that foists new hires (whom have never had a vote counted) into a Union that many, given the passage of time, may not even know exists. Yet, under the ALJD, both the Broadview group and the new hires, regardless of number, will wake up to learn that a legacy Union contingent of less than twenty (20) employees now dictates their future employment terms and representation.

The result renders *Levitz* and its warnings largely meaningless, and gives employers every incentive to simply ignore the decision. On its face, *Levitz* adopts a "stringent" standard where an employer withdraws recognition, rather than pursuing Board RM processes. *Levitz*, at 723. The clear implication is that employers should pursue a Board election rather than risk the supposed additional scrutiny that will be applied to a unilateral withdrawal of recognition and the threat of potential litigation. As the history of this matter makes abundantly clear, however, the additional scrutiny constitutes an illusory threat, and Board litigation is seemingly unavoidable. Therefore, absolutely no incentive exists to seek a Board election. Rather, employers are better off withdrawing recognition and deeming the attendant risks no different than those associated with an RM petition.

Concurrently, *Levitz*'s promises of a "more lenient" standard ring hollow. As this case makes clear, the Board may adopt even the most strained of technical analysis where that analysis serves to insulate a vulnerable union from any attempt to test majority status. And, of course, the employer should be prepared to deal with a substantial and prolonged delay that can be avoided by simply imposing a unilateral withdrawal of recognition.

Finally, *Levitz* claims that Board elections, rather than unilateral action, better promote "both employee free choice and . . . . stability in collective bargaining relationships." *Levitz*, at 727. Both propositions, given the posture of this matter, are patently false.

As to employee "free choice," a majority complement of Broadview employees will now be "accreted" into a minority group due to delay and government fiat. Likewise, a substantial number of "new hires" will soon learn that they now work in a unionized environment despite never having voted and, at least for some, never having been present at any time the Union retained Company recognition. Adding insult to these injuries, those who actually cast a ballot

in the underlying RM petition will learn a harsh lesson in the realities of Board-conducted "industrial democracy."

With respect to "stability in collective bargaining relationships," *Levitz's* preference for elections similarly crumbles in light of this case's posture. The question regarding the Union's majority status originally crystalized in 2014. It is now 2019, **five (5) years later**. No meaningful effort whatsoever has been made to guide either the Company or the Union with respect to fundamental matters such as the appropriate bargaining unit, the potential existence of two (2) bargaining units (one specific to Broadview, and the other some combination of legacy Union employees and employees hired over the preceding five (5) year period). Indeed, the ALJD itself advances an accretion analysis that both the General Counsel and the Union originally and forcefully argued against.

Even more strikingly, whatever collective bargaining relationship that historically existed is now anything but "stable." Even as of the time of this submission, the Union advances the notion that a "no Broadview" bargaining unit might exist despite the overwhelming community of interest shared by all legacy Union, new hire, and Broadview employees. This alternative theory not only recognizes a democratic reality (specifically, no matter what action the Board takes, the Broadview group remains the largest contingent in this particular employee mix), but also underscores the inherent instability of any bargaining relationship that might survive in this matter.

It is difficult to fathom how a unilateral withdrawal of recognition, with all its inherent risks, is somehow a less attractive option than adhering to Board processes under these realities.

CONCLUSION

For all the foregoing reasons, the Board should reverse the ALJD and dismiss the Complaint to the extent challenged by the Company's Exceptions.

CERTIFICATE OF SERVICE

I certify that on April 18, 2019, a copy of the foregoing ***RESPONDENT ADT'S REPLY*** **BRIEF** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail to the following parties:

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